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September 29, 2015

Federal Election Commission
Office of Complaints Examination and Legal Administration
Attn: Frankie Hampton, Paralegal
999 E Street, NW
Washington, DC 20463

RE: MUR 6888 Response of William Hurd and Hurd for Congress

SENT VIA EMAIL AND U.S. MAIL

Dear Commissioners and Staff:

The undersigned represents Mr. William Hurd and Hurd for Congress (collectively, "Respondents"). This correspondence serves as a response to the Second Supplemental Complaint filed by American Democracy Legal Fund ("Complainant") in Matter Under Review 6888, and incorporates all defenses previously asserted in Respondents' response to Complainant's first Supplemental Complaint.

For the reasons set forth herein, the Commission should find no reason to believe that Respondents have violated the Federal Election Campaign Act, and accordingly the Commission should dismiss the Complaint against them.

Summary of Complaint

Complainant alleges illegal coordination resulting in prohibited contributions. Complainant filed its initial complaint on October 14, 2014 against the Republican National Committee, American Crossroads, Crossroads GPS, Americans for Prosperity, GOP Data Trust LLC, and i360, LLC ("i360"). Complainant filed its first Supplemental Complaint on October 28, 2014 against 27 additional respondents, all affiliated with the Republican Party, including state parties and congressional campaigns, one of which was Hurd for Congress. On August 18, 2015, Complainant filed its Second Supplemental Complaint (the "Complaint"), in which it realleged the coordination violations, added additional (exclusively Republican) respondents (presidential candidates), and complained of "ongoing" violations of a similar nature.

Even after the passage of another 10 months following its initial complaint, Complainant has not undertaken to state any allegations with specificity or to proffer evidence to support particularized allegations. To the extent that a legal theory can be gleaned from the meandering

mishmash of the latest version of the Complaint,¹ it appears to be that the limited, market-transaction relationships between i360 on one hand, and various political organizations (including candidate committees) and spenders on the other, have resulted in coordinated paid communications. Regardless of however many times Complainant re-files a complaint with the Commission (and issues an attendant press release for the benefit of its *real* audience), its legal theory is baseless.

Facts

Like any candidate committee, Hurd for Congress contracted with numerous vendors for a variety of services. One of those vendors was i360, a data management firm that supplies clients with database services such as voter information and analytics.

The services provided by i360 to Respondents during the course of the campaign were limited by contract to specific items:

1. Access to Data Warehouse Records

i360 will provide Client with access to targeted records of voters and consumers *for the purposes of strategy formation, analysis and direct contact.* . . .

2. Action Management Software

i360 will make available to Client a stand-alone instance of the i360 Portal, i360's action management software. Client will be allowed to search, manage, import, export and analyze data using this tool. The instance of the i360 Portal *will be set up in an isolated, siloed database, exclusive to Client* but linked to the i360 Data Warehouse. . . .

3. Mobile Canvassing App

i360 will provide Client with access to the i360 *Mobile Canvassing App* for the purposes of advocacy, turnout, GOTV, and other electioneering purposes. . . .

4. Walk Books

i360 will provide Client with access to the i360 *Walk Books* for the purposes of advocacy, turnout, GOTV, and other electioneering purposes. . . .

5. Client Data and Client Enhanced Data

Client will provide i360 with Client Data manually or by uploading to the Action Management Software, all records or lists of Client constituents, targets, ID work, and any historical information, at the individual, household or aggregate level regarding individual or household preference, activity or other attributable information obtained by Client. In addition, Client will provide i360 with any Client Enhanced Data generated using i360 Deliverables, including any updates, corrections, additions, deletions or other changes and enhancements that Client makes during the use of i360 Deliverables. Client acknowledges this sharing of

¹ A complaint before this Commission "should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction." 11 C.F.R. 111.4(d)(3) (emphasis added). On this ground alone, the Complaint is facially deficient and should be dismissed.

information will help enhance the i360 Data Warehouse and provide enhanced capability for Client and other groups, and is thus a part of the cost of the Agreement.²

As to item 1, Respondents retained i360 for the provision of "access to targeted records of voters and consumers *for the purposes of strategy formation*" – that is to say, i360 provided access to certain voter/consumer records that would assist Respondents in *their formation of their strategy*. Nothing in the description or the nature of this transaction suggests that i360 would have any role in *formulating* campaign strategy or *even be aware of it* – a necessary component of i360 using or transmitting such campaign strategy.

As to item 2, Respondents contracted from i360 access to its data analysis software – with such access to be "*set up in an isolated, siloed database, exclusive to Client.*" That is to say, Respondents' data analytics – let alone any campaign strategy Respondents designed via resort to such data analytics – was *firewalled*.

As to items 3 and 4, Respondents obtained access to i360's software used for door-to-door voter engagement. Presumably this was also uncoordinated – and versions 1, 2 and 3 of the Complaint offer nothing to the contrary – but even if not it would not support the Complaint's allegation of a communicated *paid communication* (specifically, per Exhibit I of the Complaint, an internet advertising expenditure).

Finally, item 5 refers back to the *isolated, siloed* data analysis software program identified in item 2, with Respondents obligated to upload, as part of their consideration for entering the contract with i360, data and "enhanced" data (that is, data "including any updates, corrections, additions, deletions or other changes and enhancements"). Again, *raw data* regarding voters and/or consumers are to be submitted, not campaign strategy.

Respondents did not retain i360 for any role involving participation in, or even knowledge of, campaign strategy. Indeed, the first Supplemental Complaint concedes this point: "These candidates are paying i360 for such services as 'voter contact database subscriptions,' 'list acquisition,' 'canvassing subscriptions,' and 'data management monthly canvassing apps.'"³

Legal Analysis

Complaints alleging improper coordination appeal to political operatives because they seemingly can be filed on the basis of mere speculation. For a complaint to be actionable, however, mere speculation does not suffice. The Commission must assess a complaint's allegations and credibility, as well as the law at issue, before finding reason to advance the

² See Form of Statement of Work, Contract between i360 and Hurd for Congress, attached as Exhibit One (emphasis added).

³ See first Supplemental Complaint at 7.

complaint. As the D.C. Circuit Court of Appeals has put it, "mere 'official curiosity' will not suffice as the basis for FEC investigation."⁴

The Complaint argues that the "conduct" prong of the Commission's coordination standard has been met under these circumstances due to i360's "common vendor" relationship with various entities engaging in paid communications. The Commission summarizes this prong as follows:

If the person paying for the communication employs a common vendor to create, produce or distribute the communication, and that vendor:

Is currently providing services or provided services within the previous 120 days with the candidate or party committee that puts the vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate or political party committee; and

Uses or conveys information about the plans or needs of the candidate or political party, or information previously used by the vendor in serving the candidate or party, and that information is material to the creation, production or distribution of the communication.⁵

In offering 8 pages of named respondents but only 5 & ½ pages of allegations and analysis, the Complaint is deficient in putting Respondents on notice of the claim against them. From what the undersigned can best determine, after 3 complaints over 10 months, the most that Complainant has alleged against Respondents⁶ is that, on October 16, 2014, Americans for Prosperity made an independent expenditure in the form of an internet advertisement against Respondents' opponent, and paid i360 to disseminate the advertisement.⁷ Even if we grant *arguendo* that i360 was a common vendor of Respondents and Americans for Prosperity, Complainant has not alleged that Respondents' limited engagement of i360 "*put [i360] in a position to acquire information about the campaign plans, projects, activities or needs of [Respondents], and that i360 'use[d] or convey[ed] information about the plans or needs of [Respondents, or] information previously used by [i360] in serving [Respondents], and 'that such information [was] material to the creation, production or distribution of the [internet advertisement].'*" And, of course, we do not even reach these questions if i360 established and implemented a firewall consistent with the Commission's safe harbor provision promulgated at 11 C.F.R. 109.21(h).⁸

⁴ FEC v. Machinist Non-Partisan Political League, 655 F.2d 380, 388 (D.C. Cir. 1981).

⁵ Federal Election Commission Brochure on Coordinated Communications and Independent Expenditures, summarizing 11 C.F.R. 109.21(d)(4).

⁶ The Complaint appears to make no allegation of an "ongoing" violation by Respondents because its Exhibit III identifies no "ongoing" payment of i360 by Respondents. Of course, even if the Complaint were to identify such a payment, Respondents merely paying i360, without (much) more, would not constitute any type of violation.

⁷ See Complaint, Exhibit I.

⁸ Respondents have no knowledge of i360's internal processes beyond the terms of the parties' contract, but such terms (in particular, the nature of i360's Portal software) suggest the presence of a firewall.

After repeated bites at the apple, Complainant still presents nothing to suggest that i360 acquired information about Respondents' campaign plans, projects, activities or needs, *and* conveyed such information to Americans for Prosperity — *and* that such information was material to the creation, production or distribution of Americans for Prosperity's internet advertisement opposing Respondents' opponent. We still are left with nothing but the risible unsupported assumption in the first Supplemental Complaint that "[r]eports filed with the Commission have revealed the identities of the Republican state party committees and federal candidate committees that are using i360's voter database, and *therefore, passing on crucial non-public voter information* to i360's other 'independent' clients, entities that are legally prohibited from coordinating with the party and candidate committees."⁹ The various iterations of the Complaint all collectively rest on the intentional conflation of "information" in the form of *raw data* (submitted by an i360 client and then aggregated with other raw data), and nonpublic *strategic* information "about the campaign plans, projects, activities or needs of the candidate[.]"

Conclusion

The third time for Complainant's rehash of its 2014 cycle allegations is not the charm. Moreover, what began as a flagrant pre-election stunt, Complainant now attempts to stretch into a multi-cycle complaint against "ongoing violations," even before paid communications in the 2016 cycle by most or all of the respondents have begun (did Complainant have "Minority Report" on TV while drafting the Complaint?). The Commission should dismiss the Complaint and relieve Respondents from any further harassment.

Please contact me with any questions or for any additional information.

Sincerely,



Michael G. Adams

Attachment

⁹ First Supplemental Complaint at 6-7 (emphasis added).